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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, [redacted] 1968
No. 1336

In the Matter of:

LECKIE FREEBURN COAL COMPANY,
Bankrupt

OCTAVIA FOSTER,
BILLY HOWARD SMITH,
CLYDE HEFLIN, Trustee,
ETHEL SMITH, and
JUDY PORTER, - - - - - Petitioners

Versus

WILLARD M. HAMBLIN,
Trustee in Bankruptcy, - - - Respondent

RESPONSE TO WRIT OF CERTIORARI

From the United States Court of Appeals
for the Sixth Circuit

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STATUTES INVOLVED

KRS 382.200 CROSS-INDEX OF REAL PROPERTY CONVEYANCES, FILING AND RECORDING PERSONAL PROPERTY INTERESTS.

(1) Except as provided in Subsection (2) of this section, each county clerk shall make and keep an alphabetical cross-index of all conveyances recorded in his office, and when a mortgage or deed of trust, or any other conveyance, or contract is lodged in his office for record, he shall, at once, and before attending to any other business, place the names of the parties to the instrument upon the cross-index in his office, and shall within six days thereafter record the instrument.

(2) Chattel mortgages, financing statement or security agreements shall be filed and recorded is the manner set out in KRS 355. 9-403.

KRS 382.240 DELIVERY OF RECORDED INSTRUMENTS.

Each instrument that is recorded shall be delivered to the party entitled thereto.

QUESTIONS PRESENTED

Under Kentucky Law, where one executes a lease for the mining of minerals and in the same instrument, retains a lien upon mining equipment to secure payment or royalties and the instrument is recorded as a transaction affecting real property in the Deed Books of the Clerk's Office, is such recording sufficient to give constructive notice of the lien retained upon the mining equipment?

Assuming, without admitting, that the lien is properly recorded, but under the well-established law of Kentucky, the lien is void as a fraud to creditors, should the holder of the lien be given preference over a Trustee in Bankruptcy?

REASONS FOR DENYING WRIT OF CERTIORARI

The Court should deny Appellant's writ for the following reasons:

FIRST: The issues in this case address themselves to matters of Kentucky Law, which do not involve a Federal Statute, Federal Constitution or Treaty with a foreign power, or any

of the matters covered by Rule 19 of the United States Supreme Court, respecting jurisdiction on granting of writ of certiorari.

SECOND: Kentucky's highest court, the Court of Appeals of Kentucky, has never ha an occasion to rule on the question of dual recording of an instrument, attempting to accomlish more than one purpose, and this Court should not rule on the subject until Kentucky's highest court has had an opportunity to rule on it. Even if the appellant could convince t! Court that dual recording is not necessary, appellants still are the holders of a void lien under the well-established law of Kentucky.

It is admitted by all parties that the determination of the issues in this case will be by applicable Kentucky Law. Appellant's position, briefly stated, is that once his instrument has been taken to the Courthouse and lodged for record, it is constructive notice to all persons for all purposes and relies chiefly on the recording statutes affecting real property.

Appellee's position is that more is required of appellant. A reading of the sections governing filing of instruments respecting REAL PROPERTY and a reading of the provisions of

the Uniform Commercial Code respecting filing of instruments respecting PERSONAL PROPERTY provides two separate and different methods by which these instruments are recorded.

Instruments affecting REAL PROPERTY are recorded in accordance with KRS 382.200. This Section requires the Clerk "at once" and before attending to any other business, place the names of the parties to the instrument upon the cross-index in his office, and shall within six days thereafter record the instrument." (underscoring supplied)

On the other hand, instruments affecting PERSONAL PROPERTY are recorded in accordance with KRS 355.9-403. This Sectio provides: "The filing officer shall mark each statement with a consecutive file number and with the date and hour of filing.****."

The Clerk's duties do not end with recording and indexing the instruments. If the instrument is one affecting REAL PROPERTY, KRS 382.240 requires him to deliver it to the party entitled thereto. If the instrument is one affecting PERSONAL PROPERTY, KRS.355 9-403 requires the Clerk to hold the statement

for public inspection. Obviously the Clerk cannot comply with both sections of the Statute if only one instrument is filed or presented for filing.

Lastly, appellants are the holders of a lien void under the long and well-settled law of Kentucky. Paragraph seventh of the lease provides as follows:

> ****provided, however, the lessee shall at all times throughout the life of this lease have the right to remove any piece of its mining equipment and machinery from the leased premises for repairs, renovation or improvement of its plant, and to sell, exchange or otherwise dispose of any item of the same free of the aforesaid lien so long as the lessee maintains upon the leased premises a plant consisting of sufficient mining machinery and equipment to perform the Lessee's undertakings as herein provided.

In 1937, the Court of Appeals of Kentucky settled the question in the case of Sandy Valley Grocery Co. v. Patrick, 267 Ky. 768, 33 S.W. 2d 660. On Page 772, the Court quoted C. J. 581, Sec. 275, saying:

"Under another line of authorities a mortgage is fraudulent and void which permits the mortgagor to sell from stock from time to time, although he agrees to replace any stock sold with stock of equal value, and a mortgage which is valid on its face is invalidated by collateral permission to this effect. A great many supporting cases are cited in the notes to that text, and it is shown to be the almost universally prevailing rule in this country."

The Sandy Valley case was affirmed in the cast of Scoggan v. Dillon, 252 S.W. 2d 35. The Court said on Page 36:

"*****such a lien on stock of merchandise was invalid as against creditors who became such after its execution and did not entitle the mortgagee to preference to proceeds in the hands of a receiver."

The last time the Court considered the question, it affirmed the Sandy Valley case again in the case of Phelps v. Turner, Ky. 351 S. W. 2d 176.

A distinction should be noted between "after acquired property" and "property subject to be sold by the mortgagee."

In the present case, the lien in question covers mining equipment owned by the mortgagee at the time of the creation of the lien. The record does not disclose that any of the machinery was sold or replaced.

In 9 Am. Jur. 2d, Sec. 974, the general rule is stated:

> "In states where chattel mortgages with power of sale reserved to the mortgagor are void as against creditors, ********, they are void as against the trustee, and the goods which the chattel mortgage thus authorizes the bankrupt to sell pass to the trustee under the Bankruptcy Act as being property which the bankrupt might have transferred before bankruptcy.

Petitioners' Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED,

Jack L. Lewis,
Attorney for Respondent,
Box 146,
Paintsville, Kentucky

APPENDIX TO

RESPONSE FOR RESPONDENT

PARAGRAPH SEVENTEENTH of Lease:

****** provided, however, the Lessee shall at all times throughout the life of this lease have the right to remove any piece of its mining equipment and machinery from the leased premises for repairs, renovation, or improvement of its plant, and to sell, exchange or otherwise dispose of any item of the same free of the aforesaid lien so long as the lessee maintains upon the leased premises a plant consisting of sufficient mining machinery and equipment to perform the Lessee's undertakings as herein provided.

PROOF OF SERVICE:

I certify that a true and correct copy of the above Response was served in accordance with Rule 33 of the United States Supreme Court by mailing to Mr. Henry D. Stratton, Stratton and Johnson, P.O. Box 550, Pikeville, Kentucky, and to Mr. John Stephens, Stephens, Combs and Page, Pikeville, Kentucky, this May 31, 1969.

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